

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN L. AMADOR)	
Claimant)	
VS.)	
)	
JEFF O'NEAL FORD)	Docket No. 228,138
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the October 6, 1998 Award and October 19, 1998 Nunc Pro Tunc Award entered by Administrative Law Judge Bruce E. Moore. The Appeals Board heard oral argument on May 5, 1999.

APPEARANCES

James S. Oswalt of Hutchinson, Kansas, appeared for the claimant. Eric T. Lanham of Kansas City, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. Although the Appeals Board viewed the videotape introduced at Kurt Moomau's deposition, it did not consider the audio portion of the tape as the audio is unrelated to this claim.

ISSUES

This is a claim for a June 3, 1997 accident and alleged injuries to the neck and back. The Judge averaged a 21 percent task loss with a 74.6 percent wage loss and awarded claimant a 47.8 percent permanent partial general disability.

The respondent and its insurance carrier contend the Judge erred by awarding claimant a disability greater than the stipulated 5 percent whole body functional impairment rating. They contend that claimant was released to return to work without restrictions and, therefore, the task loss should be zero. Also, they contend claimant failed to make a good faith effort to find employment and, therefore, the wage loss should be zero. Conversely, claimant contends the Award should be affirmed.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. The Board adopts the Judge's findings, conclusions, and analysis of the evidence. Those findings and conclusions are detailed in the Award and need not be repeated here.
2. Being persuaded by Dr. Brown's testimony, the Board affirms the Judge's finding that Mr. Amador should not do 21 percent of the work tasks that he did in the 15-year period before the June 3, 1997 accident that injured his neck and back.
3. The Board also affirms the Judge's finding that Mr. Amador made a good faith effort to find employment after Jeff O'Neal Ford refused to accept him back to work. Mr. Amador contacted over 30 different companies in his efforts to find a job. He also made follow-up visits.
4. The parties stipulated that Mr. Amador's average weekly wage on the date of accident was \$425.52. At the time of the June 1998 regular hearing, Mr. Amador was working part-time as a dishwasher earning \$5.15 per hour, or approximately \$108.15 per week. The difference in Mr. Amador's pre- and post-injury wages is 74.6 percent.

CONCLUSIONS OF LAW

1. The Award should be affirmed.
2. Because Mr. Amador has injured his neck and back, the computation of permanent partial general disability is governed by K.S.A. 1996 Supp. 44-510e. That statute provides:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the

injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk¹ and Copeland.² In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the injury.

3. Respondent refused to take Mr. Amador back to work after his injury. Respondent alleges claimant then failed to make a good faith effort to find work. There is no evidence that either the dealership or its insurance carrier offered to assist Mr. Amador in finding other employment. Job placement or vocational services were not provided. As indicated in the findings above, the Board concludes that Mr. Amador made a good faith effort to find appropriate employment.

4. Because Mr. Amador made a good faith effort to find appropriate employment, the actual difference in his pre- and post-injury wages should be used to compute the wage loss prong in the disability formula.

5. Averaging the 21 percent task loss with the 74.6 percent wage loss yields a 47.8 percent permanent partial general disability.

AWARD

WHEREFORE, the Appeals Board affirms the October 6, 1998 Award and the October 19, 1998 Nunc Pro Tunc Award entered by Judge Bruce E. Moore.

¹ Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

² Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

IT IS SO ORDERED.

Dated this ____ day of May 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James S. Oswalt, Hutchinson, KS
Eric T. Lanham, Kansas City, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director